ORAL ARGUMENT HELD ON JULY 12, 2019
DECISION ISSUED ON OCTOBER 11, 2019

No. 19-5142

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP; THE TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; THE TRUMP CORPORATION; DJT HOLDINGS LLC; THE DONALD J. TRUMP REVOCABLE TRUST; and TRUMP OLD POST OFFICE LLC,

Plaintiffs-Appellants,

v.

MAZARS USA, LLP,

Defendant-Appellee,

COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant–Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 19-cv-01136 (APM)

APPELLANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION TO STAY THE MANDATE

The Committee no longer defends its request to "immediately" issue the mandate. It concedes that the mandate should not issue "during the pendency of a rehearing petition." CADC Doc. #1813409 ("Reply") 2 n.1. And it appears to agree that, if rehearing is denied, the mandate should be withheld for at least 7 days so that Plaintiffs can seek a stay from the Supreme Court. Reply 2 n.1; CADC Doc. #1812461 ("Opp.") 19-20. The only question, then, is whether this Court will stay the mandate so that Plaintiffs—including the President—can file a certiorari petition.

Respectfully, that question is not close. Despite the Committee's confidence that the Supreme Court will not be interested in this case and the Committee's suddenly "urgent" need to legislate, Plaintiffs easily satisfy the criteria for a stay pending certiorari: there is "good cause" for a stay and their petition will present a "substantial question." FRAP 41(d)(2)(A).

I. Plaintiffs have good cause for a stay.

The Committee does not dispute that good cause exists when there is "'a likelihood of irreparable harm.'" Opp. 15. And it does not dispute that, absent a stay, this case will become moot before the Supreme Court can review it—the kind of irreparable harm that provides the "'most compelling'" justification for a stay. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers).

The Committee's response—that the loss of Supreme Court review is not irreparable, Reply 12—is meritless. The whole point of a stay pending certiorari is "'to protect [*the Supreme*] *Court's* power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.'" *John Doe*, 488 U.S. at 1309 (emphasis added). Certiorari is part of "'the normal course of appellate review,'" and "foreclosure of certiorari review by [the Supreme] Court would impose irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers). In fact, when the Supreme Court loses the chance to grant certiorari because the winning party moots

the case, the Court penalizes this behavior by vacating the appellate decision. *Azar v. Garza*, 138 S. Ct. 1790, 1792-93 (2018).

Beyond keeping their case alive, Plaintiffs also need a stay to preserve their right to confidentiality—"'the quintessential type of irreparable harm.'" *Airbnb, Inc. v. City of N.Y.*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019). Although the Committee's counsel previously "'concede[d]'" that disclosing private financial records is "'obviously'" irreparable, Opp. 17, the Committee now says that's true only for "privileged" or "deeply sensitive" information, Reply 12-13. But Plaintiffs' records *are* deeply sensitive. The subpoena seeks reams of private communications and confidential records that aim to uncover every detail of the President's family businesses over the last decade. JA26.

Plaintiffs' records are privileged too. Accountants have a legally enforceable duty not to disclose their clients' confidential information. 8 N.Y.C.R.R. §29.10(c); AICPA Code of Professional Conduct §1.700.001.01. A subpoena cannot overcome this duty unless it is "validly issued and enforceable." AICPA Code §§1.700.001.02; 1.700.100.02. Thus, even in *federal* court, clients have "a reasonable expectation of confidentiality" in their accounting records, and an accountant can "refuse to produce the documents" while the client "challenges the … subpoena." *United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010).

Even if Plaintiffs' records were not privileged, Plaintiffs' loss of confidentiality would still be irreparable. "Irreparable" simply means "'monetary damages are difficult

to ascertain or inadequate.'" *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005). When confidentiality is lost, "no award of money damages will change the fact that information which Plaintiff was entitled to have kept from the knowledge of third parties is no longer shielded from their gaze." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993); *see* Opp. 16 (collecting cases). The cases making this point do not limit their analysis to "trade secrets, privileged information, or deeply sensitive personal information," as the Committee tries to do. Reply 12-13.

Nor is this a "routine … civil discovery dispute[]," Reply 13, where courts can protect confidentiality through a protective order or other remedies. This Court has foreclosed the possibility of "ordering a congressional committee to return, destroy, or refrain from publishing … subpoenaed documents." *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017). And, as the Committee told the district court, once it obtains Plaintiffs' records, it "cannot pledge that the[y] will be kept secret"; "other Members of Congress" will immediately "have access," and "the decision whether to make the records public lies within [the Committee's] discretion." 5/14/19 Tr. 59:14-25; JA306. This risk of public disclosure irreparably harms Plaintiffs. *Mikutaitis*, 478 U.S. at 1309; *Airbnb*, 373 F. Supp. 3d at 499. Even disclosure to the Committee is irreparable. As the Southern District of New York explained in a similar case, "the very act of disclosure to Congress is … irreparable…. [P]laintiffs have an interest in keeping their records private from everyone, including congresspersons." CA2 Doc. 37 at JA122:18–JA123:4, *Trump v. Deutsche Bank, AG*, No. 19-1540.

That Plaintiffs will suffer severe, case-mooting harm should end the debate over their right to a stay. The Committee does not dispute that a strong showing of irreparable harm minimizes the importance of the merits. Opp. 16 (citing *Books v. City of Elkhart*, 239 F.3d 826, 829 (7th Cir. 2001) (Ripple, J., in chambers)). And the Committee does not dispute that a strong showing of irreparable harm makes it unnecessary to balance the equities. Opp. 16 (citing *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

Regardless, the equities strongly favor Plaintiffs. The Committee cites *no* case where a nonapplicant's desire to immediately obtain information outweighed the applicant's need to prevent mootness. Cases holding the opposite are legion. Opp. 17 (collecting cases); *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J., in chambers). And Congress isn't exempt from this rule. In *Eastland*, this Court held that mootness was "[t]he decisive element" warranting a stay of a congressional subpoena. *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1256 (D.C. Cir. 1973). The Court rejected Judge MacKinnon's dissent, which argued that "the balance" favored Congress because the committee needed "to investigate to determine what legislation may be necessary." *Id.* This Court stayed the subpoena even though the committee was contemplating legislation to stop activities "disruptive of the then current" war in Vietnam. *Id.* at 1272.

Any injury to the Committee here pales in comparison. Stays pending certiorari are relatively "short." *In re Biaggi*, 478 F.2d 489, 493 (2d Cir. 1973) (Friendly, C.J.). The

House's current term is not even halfway over; and even if the Supreme Court granted and decided this case in October Term 2019, the House would have at least a quarter of its term left. While a stay is in place, moreover, Congress can consider and pass any legislation it wants. The Committee does not even offer a *theory* as to why it needs these records, which largely predate President Trump's candidacy, to pass generic disclosure laws. The only pending legislation possibly related to this subpoena (H.R. 1) died in the Senate last Wednesday. *Senate Republicans Block Effort to Pass H.R. 1* (Oct. 30, 2019), bit.ly/2qeLAD8. And the Committee's insistence that it suffers "severe and irreparable harm" every "day" it cannot legislate is refuted by its voluntary decision to stay this subpoena for six months. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (agreeing that a self-imposed "eight-week delay … undermines [the nonapplicant's] allegation of irreparable harm").

Instead of unpacking its need for these records, the Committee insists that this Court cannot "second-guess" its representations. Reply 10. But Congress is not a super-litigant who automatically wins the balance of equities. *E.g.*, *Eastland*, 488 F.2d at 1256. Courts must "balance" the "public interest in the congressional investigation" against individual rights and "executive … interests." *United States v. AT&T Co.*, 567 F.2d 121, 128-29 (D.C. Cir. 1977). Courts especially "must … consider the nature of [the Committee's] need when [they] are called upon, in the first such case in our history," to uphold a subpoena for the President's personal records. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974). Generic concerns about

"delay" cannot prevail in cases, like this one, that have lasting "consequences for the functioning of the Presidency." *In re Lindsey*, 158 F.3d 1263, 1288 (D.C. Cir. 1998) (Tatel, J., concurring in part and dissenting in part); *accord AT&T*, 567 F.2d at 133; *House Judiciary Comm. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008).

II. Plaintiffs' certiorari petition will present a substantial question.

Only the Committee believes this case presents no "important question of federal law." S. Ct. R. 10(c). This Court, the district court, and the United States all disagree. Opp. 13. And only the Committee believes these questions are settled. This Court's opinion resolved numerous questions of first impression. And this Court upheld, for the first time, a congressional subpoena for a President's personal records. The majority called this a "twist," Judge Rao called it "the whole plot," but all acknowledged that the Court broke new ground. Maj. Op. 65; Dissent 52. There is a reasonable possibility that four Justices will agree.

As Plaintiffs explained, this case involves at least three unsettled questions of constitutional law. Opp. 12-14.[1] ***First***, are the House Rules subject to the presidential clear-statement rule? While the Committee believes House Resolution 507 resolved this

[1] Plaintiffs' counsel never told the Second Circuit that Plaintiffs "*only* take issue" with how this Court applied the law to the facts. Reply 4 (emphasis added). Counsel explained that this Court agreed with Plaintiffs on four overarching legal principles, but "disagreed with Plaintiffs' arguments" when applying those principles. CA2 Doc. 202, *Trump v. Deutsche Bank*. This Court's disagreements, in turn, raised at least three questions of constitutional law that warrant certiorari—some of which are not implicated in the Second Circuit case.

issue, Reply 8, this Court disagreed. It did "not address" the effect of the resolution, which "purports neither to enlarge the Committee's jurisdiction nor to amend the House Rules." Maj. Op. 63. This Court instead definitively held that the House Rules are *not* subject to the clear-statement rule. Maj. Op. 58-60.

Second, can Congress legislatively require the President (and the Justices) to disclose personal financial information to the public? The Committee believes this case is a "poor vehicle" to address that question, Reply 7, but that is *Plaintiffs'* point. Challenges to congressional subpoenas are "not the most practical method of inducing courts to answer broad questions broadly," which is why courts must "avoid such constitutional holdings" by construing the committee's authority "narrowly." *Tobin v. United States*, 306 F.2d 270, 274-75 (D.C. Cir. 1962). This Court disagreed—instead answering several unsettled questions about the constitutionality of disclosure laws, the meaning of the Emoluments Clauses, the scope of the presidential clear-statement rule, and the contours of the ban on congressional law enforcement. There is a fair prospect that the Supreme Court will resolve these questions differently, or at least find them difficult enough to construe the Committee's authority narrowly.

Third, can Congress issue a legislative subpoena that has the avowed purpose of investigating the President for illegal conduct? This Court did not evaluate the subpoena's "'real object,'" "'primary purpose,'" or "'gravamen.'" Appellants' Reply Br. 11. It asked only whether legislation was "an insubstantial, makeweight" purpose. Maj. Op. 28. And this Court held that the express "avowal" of an illegal law-enforcement

purpose does not "spoil[]" an "otherwise valid legislative inquiry." Maj. Op. 29. As Judge Rao explained, however, "the gravamen of the Oversight Committee's investigation … is the President's wrongdoing." Dissent 50. "[T]he Committee has emphasized repeatedly and candidly its interest in investigating allegations of illegal conduct by the President." Dissent 38. While the Supreme Court has "upheld some congressional investigations that incidentally uncover unlawful action by *private citizens*," Judge Rao noted, an investigation into "wrongdoing of the President … has never been treated as merely incidental to a legislative purpose." Dissent 46-47 (emphasis added). That is because courts cannot give Congress the benefit of the doubt when it wields its subpoena power against the Chief Executive. Maj. Op. 24-25; U.S. Amicus Br. 19. The Committee's assertion that Plaintiffs and the United States "do not … adopt" Judge Rao's analysis is, frankly, mystifying. Reply 3.

Equally mystifying is the Committee's claim that its unexplained, eleventh-hour invocation of "impeachment" means the subpoena "now would satisfy [Judge Rao's] concerns." Reply 11. The Committee makes no effort to square its late-breaking assertion with the Court's observation that "Plaintiffs may very well be right that the authority of a congressional committee to issue subpoenas 'cannot be enlarged by subsequent action of Congress.'" Maj. Op. 63-64. And the Committee makes no effort to explain how its subpoena is possibly part of the House's existing inquiry into impeachment. Opp. 8-9. Injecting impeachment into this case raises more questions than it answers.

Even if the Committee were right that this case involves only the "application of settled legal principles to the facts of this case," Reply 4, this case would still warrant certiorari. The Committee agrees that "the facts of this case" are an unprecedented legislative subpoena for the personal records of a sitting President. Reply 8. And the Committee does not dispute that this case "upholds—for the first time—a targeted investigation of the President's alleged unlawful conduct under the legislative power." Dissent 37. When courts break new ground by extending legal principles from other contexts to the President himself, the Supreme Court does not hesitate to grant certiorari. *E.g.*, Brief in Opposition, *Trump v. Hawaii*, No. 17-965 (U.S.) (unsuccessfully arguing that "[t]he traditional justifications for granting certiorari are absent" because the case applied settled law to the President); *Clinton v. Jones*, 520 U.S. 681, 692 (1997) (granting certiorari in the first case to meaningfully subject a President to civil litigation for pre-presidential conduct). As Judge Rao put it, "while this case deals only with a single subpoena, the [Court's] recognition of a wholly unprecedented power to investigate shifts the balance between the branches." Dissent 67. Given the "national[] importan[ce]" of this precedent, "perceived 'error' in [this Court's decision] does indeed become relevant for certiorari purposes." Stern & Gressman, *Supreme Court Practice* §4.I.2 (10th ed.).[2]

[2] Tellingly, the Committee could not find any case where certiorari was denied to a President who was subjected to an innovative use of legal process. The one case it cites, Reply 9, involved process against the *First Lady*, not the President. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913 (8th Cir. 1997).

Again, this Court does not need to agree with Plaintiffs on the merits to grant a stay. No applicant could ever receive a stay if he had to convince the court that its own decision is probably incorrect. Instead, this Court merely needs to acknowledge that other jurists could view the dispositive issues in this case differently, as Judge Rao did. Before this Court resolves these important issues "not just for this President, but for all Presidents to come," *Lindsey*, 158 F.3d at 1283 (opinion of Tatel, J.), it should at least allow the Supreme Court to consider whether it wants to review them.

CONCLUSION

This Court should grant rehearing or stay the mandate until Plaintiffs file a certiorari petition with the Supreme Court.

Dated: November 4, 2019

Respectfully submitted,

s/ William S. Consovoy

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CERTIFICATE OF COMPLIANCE

This document complies with Circuit Rule 27(c) because it contains 2,592 words, excluding the parts that can be excluded. This brief also complies with Rule 27(d)(1)(E) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: November 4, 2019 *s/ William S. Consovoy*

CERTIFICATE OF SERVICE

I filed a true and correct copy of this document with the Clerk of this Court via CM/ECF, which will notify all counsel.

Dated: November 4, 2019 *s/ William S. Consovoy*